



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 24, 2003

Ms. Cara C. Wood  
Assistant District Attorney  
9<sup>th</sup> Judicial District  
301 North Thompson, Suite 106  
Conroe, Texas 77301-2824

OR2003-6714

Dear Ms. Wood:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188237.

The Office of the District Attorney, 9<sup>th</sup> Judicial District (the "district attorney") received a request for eight categories of information relating to a specified capital murder case. You state that records of the Federal Bureau of Investigation ("FBI") that were held by the district attorney have been returned to the FBI as required by that agency. *See* Open Records Decision No. 576 (1990) (governmental body by or for which information collected, assembled, or maintained has ultimate responsibility for release or nondisclosure of information). You also state that portions of the requested information will be or have been made available for inspection. You claim, however, that other portions of the requested information are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

As a preliminary matter, you indicate that the information submitted as Exhibit D was obtained by the district attorney pursuant to a grand jury subpoena as the agent of the grand jury. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to the Public Information Act (the "Act"), so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See Open Records Decision No. 513 (1988)*. When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, based on your representation that the information in Exhibit D was obtained pursuant to a grand jury subpoena, we find that this information is in the custody of the district attorney as agent of the grand jury and is not subject to disclosure under the Act. *Id.* at 4. Accordingly, the district attorney need not release this information.

Next, you contend that a portion of the submitted information is excepted from disclosure under section 552.108 of the Government Code, which provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [is excepted from required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution [is excepted from required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108(a)(4), (b)(3), (c). You contend that the information submitted as Exhibit C is excepted from disclosure under sections 552.108(a)(4) and (b)(3) as information protected by the attorney work product privilege. You state that the present request "is tantamount to a request for the entire file of the prosecutor."

When a request essentially seeks an entire prosecution file, the information is excepted from disclosure in its entirety pursuant to the Texas Supreme Court's decision in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994) (discovery request for district attorney's entire litigation file may be denied because the decision of what to include in the file necessarily reveals the prosecutor's mental impressions or legal reasoning). In your comments to this office, however, you state that portions of the requested information will be or have been made available for inspection. Thus, we find that *Curry* is not applicable in this instance.

You state that the information in Exhibit C consists of portions of trial notebooks prepared by a prosecutor, and you indicate that this information reflects the mental impressions or legal reasoning of the prosecutor. Upon review, we determine that you may withhold the information in Exhibit C pursuant to section 552.108(a)(4) of the Government Code.

We next address the information submitted as Exhibit E. Exhibit E contains information that is excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by other statutes. The tax return information in Exhibit E is confidential pursuant to section 6103(a) of title 26 of the United States Code. See Attorney General Opinion H-1274 (1978); see also Open Records Decision Nos. 600 (1992) (W-4 forms confidential), 226 (1979) (W-2 forms confidential).<sup>2</sup> The district attorney must withhold the tax return information we have marked in Exhibit E pursuant to section 552.101 as information made confidential by federal law.

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<sup>2</sup>Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. See 26 U.S.C. § 6103(b).

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

This office has found that personal financial information is generally excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy). This office has also ruled, however, that the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). We have marked personal financial information in Exhibit E that is excepted from disclosure under section 552.101 in conjunction with common-law privacy.

Next, we note that criminal history record information ("CHRI") is confidential and not subject to disclosure. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2)(B). The district attorney must withhold any CHRI falling within the ambit of these state and federal regulations pursuant to section 552.101 of the Government Code.

The information submitted as Exhibit H consists of autopsy photographs and x-rays, the disclosure of which is governed by section 11 of article 49.25 of the Code of Criminal Procedure. Section 11 provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death,

and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall be a part of the record. Copies of all records shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. The district attorney must withhold the autopsy photographs and x-rays pursuant to section 11 of article 49.25 of the Code of Criminal Procedure.

The submitted documents also contain information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

We have marked the Texas driver's license information that the district attorney must withhold pursuant to section 552.130 of the Government Code.

Finally, we note that social security numbers in the submitted information may be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of

confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district attorney pursuant to any provision of law enacted on or after October 1, 1990.

In summary, information obtained by the district attorney as the agent of the grand jury is in the grand jury's constructive provision and is not subject to release under the Act. The district attorney may withhold the types of information submitted as Exhibit C pursuant to section 552.108(a)(4) of the Government Code. Tax return information must be withheld under section 552.101 of the Government Code in conjunction with federal law. We have marked personal financial information that must be withheld pursuant to section 552.101 in conjunction with common-law privacy. Criminal history record information must be withheld pursuant to section 552.101 in conjunction with chapter 411 of the Government Code and federal regulations. Autopsy photographs and x-rays must be withheld pursuant to section 11 of article 49.25 of the Code of Criminal Procedure. Texas driver's license information must be withheld under section 552.130 of the Government Code. Social security numbers may be excepted from disclosure pursuant to section 552.101 in conjunction with federal law. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free,

at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 188237

Enc: Submitted documents

c: Ms. Paulette Everett-Norman  
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(w/o enclosures)